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No. 08-396

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MATICAN,

Petitioner,

-v.-

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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October 22, 2008

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's grant of summary judgment to defendant City of New York because, as a matter of law, the actions of the Police Department in planning and carrying out the arrest of Mr. Delvalle do not shock the contemporary conscience?

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REASON FOR DENYING THE PETITION

THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT. THAT COURT'S ORDER COMPLIES WITH PRECEDENTS OF THIS COURT AND DOES NOT CONFLICT WITH PRECEDENTS OF THE OTHER COURTS OF APPEALS.

The Court of Appeals resolved this matter in complete consistency with the leading precedent of County of Sacramento v. Lewis, 523 U.S. 833 (1998). In that case, this Court addressed the level of culpability that must be proven to satisfy the "shock the contemporary conscience" element of a cause of action under the substantive aspect of the Due Process Clause of the Fourteenth Amendment. At one extreme, this Court stated that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." Id. at 849. At the other extreme, this Court stated that "conduct intended to injure in some way unjustifiable by any governmental interest is the sort of official action most likely to rise to the conscience-shocking level. Id.

This Court continued, in Lewis, to state that levels of culpability between those two extremes, such as recklessness or gross negligence, are "matter[s] for closer calls." Id. This Court counseled "an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." Id. at 850. Among the factors that affect the appropriate measure of conscience-shocking in individual cases are the opportunity for deliberation and the pull of competing obligations. Id. at 853.

Petitioner assumes that an opportunity for deliberation, standing alone, makes deliberate indifference a sufficient level of culpability to satisfy conscience-

shocking in a substantive due process case. He ignores, however, other factors that make an intent to harm the requisite level of culpability in this context. In the instant matter, the police officers had competing obligations: to safeguard petitioner, to protect themselves, and to remove a drug merchant from the streets of the City before he could blight any more lives. The Court of Appeals properly declined to second-guess the weight that the police placed on each of its competing obligations. Compromise in such delicate police decisions is unavoidable. The Court of Appeals correctly held that only an intent to harm would shock the contemporary conscience in that setting.

In Lewis, this Court emphasized that "[r]ules of due process are not, however, subject to mechanical application in unfamiliar territory." Id. at 850. The Court of Appeals correctly held that, in the factual context of this case, only an intent to harm would shock the contemporary conscience. That Court reasonably followed this Court's guidance as to sufficient levels of culpability in substantive due process cases.

Petitioner argues to this Court that the order of the Court of Appeals conflicts with precedents of the other Courts of Appeal. These is no such conflict. In four cases cited by petitioner, the Court of Appeals require proof of an intent to harm in order to prove conscience-shocking. In those cases, accordingly, discussion of a lesser standard is only obiter dictum. Perez v. Unified Government of Wyandotte County, 432 F.3d 1163 (10th Cir. 2005); Fraternal Order of Police Department of Corrections Labor Committee v. Williams, 363 U.S. App. D.C. 1, 375 F.3d 1141 (D.C. Cir. 2004); Neal v. St. Louis County Board of Police Commissioners, Moreland v. Las Vegas Metropolitan Police Department, 159 F.3d 365 (8th Cir. 1998).

In three cases cited by petitioner, the Court of Appeals did not have to decide upon an appropriate level of

culpability because the evidence did not suffice to prove culpability above the level of negligence. In those cases, accordingly, discussion of a lesser standard is only obiter dictum. King v. East St. Louis School District 189, 496 F.3d 812 (7th Cir. 2007); Schieber v. City of Philadelphia, 320 F.3d 409 (3d Cir. 2003); Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir.).

In only one case cited by petitioner did the Court of Appeals actually hold that proof of deliberate indifference would suffice to prove shock of the contemporary conscience. In Brown v. National Bank Corp., 188 F.3d 579 (5th Cir. 1999), the plaintiffs sued federal agents and cooperating private businesses who made them targets of an undercover operation designed to detect contract procurement fraud in the space industry. The Court of Appeals held that proof of deliberate indifference would suffice to prove shock of the contemporary conscience. Id. at 592. Absent from that case, however, was any police obligation to remove a dangerous criminal from the streets. Furthermore, the Court of Appeals dismissed the case on grounds of qualified immunity. The factual context of Brown is quite distinguishable from that of the instant case.

In sum, the Court of Appeals resolved the instant case reasonably and in full compliance with Lewis. There is no conflict among the Courts of Appeals for this Court to harmonize. This is not an appropriate case for review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 23, 2008

Respectfully submitted,

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